



ASSOCIATION OF  
RESEARCH LIBRARIES

November 6, 2014

Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Jessica Rosenworcel  
Commissioner Ajit Pai  
Commissioner Mike O'Rielly  
Federal Communications Commission  
445 12<sup>th</sup> St. SW  
Washington, D 20554

**RE: Ex parte presentation in WC Docket No. 14-28**

Dear Mr. Chairman and Commissioners:

The American Library Association (ALA) and the Association of Research Libraries (ARL) submit this letter to follow up on the views our counsel, John Windhausen, presented at the Open Internet Roundtable discussion of legal issues on October 7, 2014. We very much appreciated the opportunity to participate in the Roundtable, and the openness of the Commission's process is a testament to its commitment to a full discussion of the issues in this very important proceeding.

ALA, ARL and a coalition of national higher education and library groups have filed several comments in this proceeding setting forth an "Internet reasonable" approach to the issues in this proceeding. Following the Roundtable, several observers have asked how the proposed "Internet reasonable" approach would work in practice, and this letter attempts to answer those questions.

An "Internet reasonable" policy framework could help to transcend the polarized legal debate around Title II or Section 706. Rather than allow the decision about legal authority to dictate the policy result, the FCC should focus on adopting the best set of policies that will protect Internet openness consistent with its legal authority. The "Internet reasonable" approach discussed below could provide such a policy framework by including a mix of bright line rules, presumptions, and areas open to negotiation.

**I. The Importance of an Open Internet for Higher Education, Libraries and the Public Interest.**

Preserving an open Internet is absolutely essential for education, research, and learning. This proceeding is not just about small businesses, innovation and economic growth, although those values are also significant. The Internet has become a vitally important platform for libraries and higher education in a wide variety of ways, such as for multi-media instruction and distance learning,

educational collaboration through document-sharing websites and applications, storage and retrieval of digital archives, tele-health information, public access to Internet information, and many other educational services. Ensuring the Internet remain an open platform is absolutely essential for libraries to serve their communities.

Furthermore, preserving an open Internet is essential to our nation's freedom of speech, civic engagement, innovation, economic growth and the broader public interest. Public broadband providers have financial incentives to interfere with the openness of the Internet and may act on these incentives in ways that could be harmful to the public interest, including the Internet content and services provided by libraries and educational institutions. Preserving the unimpeded flow of information over the public Internet and ensuring equitable access for all people is critical to our nation's social, cultural, educational, and economic well-being.

Before addressing the specific merits of the "Internet reasonable" approach, the following summarizes some of the other recommendations submitted by the coalition of library and higher education organizations:

- The scope of the rules should be adjusted to clarify that libraries, institutions of higher education, and all public interest institutions are included in the definition of "mass market" (not just schools and libraries that participate in the E-rate program). The proposed open Internet rules should explicitly apply to public broadband Internet access service provided to libraries, institutions of higher education and other public interest organizations.
- The proposed ombudsman should be authorized to protect libraries and educational institutions, not just entrepreneurs.
- The proposed rules should be technology-neutral and should apply equally to fixed and mobile services. To the extent that there are technological differences between fixed and mobile networks, these differences can be addressed by a "reasonable network management" enforcement analysis.
- Public statements from the Commission should identify the valuable role that Internet openness plays for libraries and education, and should highlight the critical role that public access to information plays in the "virtuous circle of innovation."
- The FCC should clarify that its rules only apply to network providers that offer service to the general public and not to private networks operated by libraries and higher education for their internal uses.

## **II. Problems with the "Commercially Reasonable" Approach**

Libraries are largely non-commercial entities, and for this reason, we have expressed strong opposition to the "commercially reasonable" standard proposed in the Notice of Proposed Rulemaking (NPRM) in

this proceeding.<sup>1</sup> This “commercially reasonable” standard is not required by Section 706 or the court decisions, and, for the following reasons, this standard would not protect the openness of the Internet:

- The very terminology of “commercially reasonable” suggests that the Commission would evaluate ISP behavior based on “commercial” interests, when the interests of libraries in an open Internet are decidedly “non-commercial” in nature. The FCC should make these decisions based on what is in the “public interest”, not the commercial interests of companies.
- The “commercially reasonable” standard was initially adopted to solve a very different problem (data roaming). The issue in that proceeding was whether commercial cellular companies would enter into roaming contracts with other cellular companies. In contrast, ISPs are not expected to enter into commercial contracts with the millions of edge providers around the world who provide services on the Internet.<sup>2</sup> If the FCC uses the same terminology for both data roaming and Internet openness, courts and other enforcement officials may be inclined to import concepts from one domain into the other, resulting in confusing and inconsistent results.
- The “commercially reasonable” standard in the Data Roaming decision imposed only a mandate to negotiate, using a wide range of 16 factors in determining permissible/impermissible behavior. This lack of clarity has led several providers to allege that the “commercially reasonable” standard is not working to promote data roaming.<sup>3</sup> Protecting an open Internet requires the Commission to provide much more clarity around permissible and impermissible behavior than the “commercially reasonable” standard.
- Many of the 16 factors that the Commission used to determine “commercially reasonable” are simply inapplicable to protecting an open Internet. For instance, the factors include the existence of voice roaming agreements, the need for data roaming in the coverage area, the propagation characteristics of the spectrum in the area, all of which are inapplicable to Internet edge providers and consumers. The Commission cannot import these factors to the Open Internet proceeding and must come up with different factors, so there is no reason to retain the “commercially reasonable” heading.
- Perhaps the only conceivable reason for retaining the “commercially reasonable” terminology is that the D.C. Circuit Court of Appeals upheld the “commercially reasonable” standard in the *Cellco* case.<sup>4</sup> But this decision is unlikely to have precedential value since the issue in this proceeding is different, and the factors would have to be changed even if the Commission retains the “commercially reasonable” term. In other words, applying the “commercially reasonable” label to a new set of factors would likely not convince a court to uphold a “commercially reasonable” standard just because it had the same label as the approach upheld in *Cellco*.

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<sup>1</sup> We note that the Commission specifically invited parties to submit alternative standards in paragraph 112 of the NPRM. (“[We] seek comment on whether the Commission should adopt an alternative legal standard to govern broadband providers’ practices.”)

<sup>2</sup> <http://www.internetlivestats.com/total-number-of-websites/>.

<sup>3</sup> See, In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc. (filed May 27, 2014) and the comments of several other parties in that proceeding.

<sup>4</sup> *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012)

### **III. An “Internet Reasonable” Approach Would Protect the Basic Principles that Form the Foundation of the Internet.**

In contrast to the “commercially reasonable” standard, an “Internet reasonable” framework provides a holistic and consistent framework for protecting the openness of the Internet that is directly on point with the purpose of this proceeding. The very title of this proceeding is to “protect” and “promote” the openness of the Internet, and the “Internet reasonable” standard would do exactly that – it “hits the nail on the head.” Furthermore, the complex legal issues involved in this proceeding threaten to make the FCC’s approach difficult for the general public to understand. Given the enormous number of public comments submitted in this proceeding and the intense press scrutiny, the Commission needs to be able to articulate an approach that is understandable, clear to all participants and not dictated by the legal intricacies.

The foundational principle of the Internet is that, once a consumer or edge provider pays an “entrance fee”, the consumer/edge provider can access any lawful web site, use any lawful application, and engage in any lawful communication without any interference from the ISP. The ISP is neutral – it does not manipulate the content of the traffic or interfere with the content of consumer’s or edge provider’s Internet use. This should be the guiding principle underlying the “Internet reasonable” approach that we believe the FCC should use to assess any net neutrality issue. Activities by an ISP that interfere with the consumer’s or edge provider’s use should be prohibited, and those that do not conflict with this principle should be permitted.

The “Internet reasonable” approach begins by recognizing that the Internet is an incredibly valuable resource – a wonderfully democratic platform for free speech, education, learning, entrepreneurship and innovation. It is the electronic “town square” that allows open and unfettered dialogue across the world. The “Internet reasonable” approach is built around preserving the existing Internet. The Commission’s approach should protect the existing culture and character of the Internet (e.g., innovation without permission) and ensure that it survives and prospers into the future. In short, the Internet works, and the “Internet reasonable” approach is designed to make sure that it continues to work.

### **IV. The “Internet Reasonable” Framework Can Be Implemented in a Manner that Provides a Coherent Approach to Protecting the Openness of the Internet.**

In implementing an “Internet reasonable” approach, the Commission should provide as much guidance as possible to consumers, edge providers and the Internet marketplace, while still allowing for flexibility to accommodate changes in Internet technologies. Thus, the process for enforcing the “Internet reasonable” principle should include a mix of bright-line rules that prohibit certain activities and presumptions in favor of or against certain activities.

This approach would allow the Commission to consider the merits of each action on a case-by-case basis and assess the action’s impact on the Internet ecosystem, rather than solely the commercial interests of the contracting parties. It further allows the FCC to take a more comprehensive look at several public interest factors, including the vital areas of public interest that libraries serve, and that the Internet was originally designed to support – education, research and learning. Libraries, higher education,

innovators and consumers increasingly operate as both consumers and edge providers, and an “Internet reasonable” approach could (and should) apply to both sides of the market.

The first step to implementing the “Internet reasonable” approach is to establish a broad definition of “Internet access service” that recognizes the many aspects of providing Internet access service in addition to just the transmission of bits. For instance, the provision of initial broadband connectivity, the billing arrangements, the location of caching services, and address translation are all essential components of Internet access service that support the transmission of traffic. In this way, Commission rules against certain transmission practices would not be considered a duty to provide a certain single service in a certain way, but would simply be a regulation concerning certain components of a much broader service.

The “Internet reasonable” framework could consider actions by ISPs in four categories, as follows:

1. The Commission should ban certain actions by ISPs, such as intentional degradation of certain Internet traffic, re-direction of Internet traffic, and edge-provider paid prioritization. Certain practices so fundamentally undermine Internet openness and the “entrance fee” principle that they should be prohibited altogether. Clarifying that these practices are outlawed will provide greater certainty to edge providers and consumers that the Internet will remain open, thereby giving them incentives to develop new Internet-based products and services (e.g., library innovations in information access, community building, and online learning and research), and thus fostering the “circle of innovation” that promotes broadband investment. Such a category would be consistent with Chairman Wheeler’s statement on the release of the NPRM, that “[p]rioritization that deprives the consumer of what the consumer has paid for would be . . . therefore prohibited.”<sup>5</sup> AT&T agrees that non-user-directed prioritization should be prohibited.<sup>6</sup>
2. The Commission should also establish rebuttable presumptions against certain activities and allow the ISP an opportunity to overcome the presumption by proving that its action is consistent with “Internet reasonableness.” Certain activities are not currently a part of the existing Internet, and there are good reasons to believe that such actions could undermine the “entrance fee” model. For instance, exclusive arrangements to provide prioritized services to only one firm, whether or not it is affiliated with the ISP, should be presumptively unlawful. Such exclusive arrangements would favor one edge provider over others not based on the consumer’s choice, but based on the ISP’s choice. This would presumptively conflict with the idea that the ISP is to remain neutral and is not to favor one party over another. The ISP should be given an opportunity to demonstrate that certain preferential arrangements are in the public interest, but the burden should be on the ISP to make this case.
3. The Commission should also establish rebuttable presumptions in favor of certain practices by ISPs. For instance, the Commission might presume that ISPs are able to negotiate individual arrangements regarding caching (local storage) of content for some edge providers and may be

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<sup>5</sup> Statement of Chairman Wheeler, Protecting and Promoting the Open Internet, May 15, 2014, FCC 14-61.

<sup>6</sup> See, e.g., blog post by Bob Quinn, AT&T, July 17, 2014 (“In short, we have laid out a viable and sustainable framework . . . including banning paid prioritization – where an ISP prioritizes packets over the consumer’s last mile broadband Internet access service without being directed to perform that prioritization by the consumer.”) available at <http://publicpolicy.att.com/att-open-internet-policy-statement>.

able to provide billing services to some customers or edge providers on a one-to-one basis. Such activities do not involve the transmission of traffic but would still be understood as part of the umbrella of Internet access services, per the clarified definition noted previously. For this category, the ISP would be presumed to be acting in a manner that is not inconsistent with the “Internet reasonable” standard, but an edge provider or consumer would still have the opportunity to file a complaint and meet its burden of proof that the ISP’s action was nonetheless inconsistent with Internet openness and would harm the public interest.

4. Finally, the Commission could create a fourth category of actions for which no presumption applies. This category would include any activity that does not fall into any of the previous three categories. This would leave the FCC with the discretion to decide whether or not the action conflicts with the “Internet reasonable” standard.

## **V. The “Internet Reasonable” Approach Is Consistent with FCC’s Legal Authority to Protect and Promote an Open Internet.**

The Internet reasonable approach laid out above could operate under any legal regime that the FCC chooses to adopt, including Title II, Section 706, or some combination thereof. Some commenters have asserted that Section 706 does not allow the FCC to establish bright-line rules or presumptions. The following discussion explains how, even if the FCC chooses not to classify broadband Internet access as a Title II service, the “Internet reasonable” framework sketched out above complies with the statutory language and the case law regarding Section 706.

Several years ago, the FCC classified broadband Internet access as an information service, not a Title II “telecommunications service.” Under the Communications Act, the Commission cannot “treat” ISPs as common carriers (unless it changes its prior classification decision).<sup>7</sup>

What does it mean to “treat” broadband ISPs as common carriers? Does establishing bright-line rules or presumptions necessarily “treat” broadband ISPs as common carriers? The court decisions on this question are not crystal clear, but there have been three cases interpreting this particular statutory language, and another set of cases that interprets a similar statutory provision that bars the FCC from regulating broadcasting or cable companies as “common carriers.” These cases suggest that there are three indicia of “common carriage:”

- (i) A duty to serve;
- (ii) A duty not to engage in unjust or unreasonable discrimination, and
- (iii) A duty to charge just and reasonable rates.<sup>8</sup>

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<sup>7</sup> Section 153(51) states “A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services.”

<sup>8</sup> For instance, the *Verizon* court found that, “[Title II] sets forth the duties of common carriers, including the obligations to “furnish . . . communication service upon reasonable request,” *id.* § 201(a), to charge “just and reasonable” rates, *id.* § 201(b), and to refrain from “mak[ing] any unjust or unreasonable discrimination in charges . . . or services,” *id.* § 202(a). Slip Op. pp. 3-4.



Of these, the non-discrimination obligation appears to be most significant. The *Verizon* court overturned the 2010 net neutrality rules largely because it found that the FCC had imposed the same “non-discrimination” standard found in Title II. The *Verizon* court said,

We have little hesitation in concluding that the **anti-discrimination** obligation imposed on fixed broadband providers has ‘relegated [those providers], *pro tanto*, to common carrier status.’ *Midwest Video II*, 440 U.S. at 700–01. In requiring broadband providers to serve all edge providers without ‘**unreasonable discrimination**,’ this rule by its very terms compels those providers to hold themselves out ‘to serve the public indiscriminately.’ NARUC I, 525 F.2d at 642.” [emphasis added]<sup>9</sup>

In other words, the 2010 rules were overturned because they imposed a common carrier-like non-discrimination requirement on broadband ISPs<sup>10</sup>, even though the FCC had previously ruled that they were not common carriers.

Similarly, in *Midwest Video II*, the Supreme Court overturned the FCC’s rules because it found that the FCC had imposed common carrier obligations on cable operators. The rules required cable systems “to hold out dedicated channels on a first-come, **nondiscriminatory** basis,” prohibited them from “determining or influencing the content of access programming,” and “delimit[ed] what [they could] charge for access and use of equipment.” The public-access rules thus obligated cable companies to set aside a dedicated space for members of the public to broadcast any message they might choose either at no cost or at a price dictated by the Commission. [emphasis added]<sup>11</sup>

A finding of common carriage thus does not depend on whether or not the Commission has imposed bright-line rules. In fact, these cases suggest that the Commission has the latitude to establish bright-line rules and presumptions as long as it does not impose a non-discrimination requirement, a duty to serve or a just and reasonable rate regulation requirement on broadband ISPs. For instance, the *Cellco* decision upheld the data roaming rules even though the FCC had established a bright-line rule against “unlawful restraints of trade”. This suggests that the Commission can prohibit certain practices, such as paid prioritization or intentional degradation of traffic, as long as the regulatory regime as a whole allows the ISPs some flexibility in some other aspects of their Internet access service. In other words, as long as some aspects of Internet access service are open to negotiation, the Commission can take strong action to forbid other practices or behaviors.

The case law thus allows the FCC quite a number of options under section 706. For instance, it can state that certain activities are inherently unlawful, it can place boundaries around the ISPs’ behavior, it can impose terms and conditions on the ISPs’ service offerings, and it can establish presumptions in favor of or against certain behavior, as long as none of these rules imposes a duty to offer service indiscriminately at a regulated price.

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<sup>9</sup> See *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). Slip Op. p.56.

<sup>10</sup> The 2010 Open Internet rules only applied to Internet access providers that serve the general public, and this policy should be continued in this proceeding.

<sup>11</sup> *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-702 (1979).

Furthermore, as long as the Commission allows ISPs some degree of flexibility in their relationships with consumers/edge providers, it is likely to be upheld on appeal because the courts have given the Commission deference in determining whether or not its regulations constitute common carriage. Both the *Cellco* and *Verizon* decisions recognize that the FCC's judgment in this matter is to be given *Chevron* deference. These cases also recognize that deciding whether or not a regulatory regime imposes common carriage is a "gray area."<sup>12</sup> The court has said that a regulatory regime might "bear marks" of common carriage, but that is not enough to "relegate" broadband Internet access providers "to common-carrier status."<sup>13</sup>

The following offers views on a number of other issues raised in this proceeding:

a. Negotiations

Some observers interpret the *Cellco* and *Verizon* decisions as saying that section 706 must permit the carriers to engage in unlimited negotiations. But reading these cases in such an extreme manner would effectively eviscerate the section 706 authority that the *Verizon* court upheld. If the court cases are read to permit ISPs unlimited authority to engage in individualized negotiations over every matter, the Commission would have no authority under Section 706 to declare any action impermissible, which conflicts with the *Verizon* court's decision that the Commission does, in fact, have authority to rule some actions to be impermissible. A better reading of the *Cellco* and *Verizon* decisions is that the FCC would be wise to permit broadband ISPs some degree of individualized negotiations in order to avoid a finding of non-discrimination,<sup>14</sup> not that everything must be open to individualized negotiation.

b. Presumptions

Similarly, some observers also make the claim that use of presumptions is not permitted under Section 706, but this is also an overstatement. It is true that the *Cellco* decision twice briefly refers to the lack of a presumption in the data roaming decision.<sup>15</sup> But the court did not rely on the lack of a presumption as a material factor in its decision. By the time the court first mentions the lack of a presumption in the data roaming rule, the court had already concluded that the data roaming obligation was not equivalent to common carriage. Three pages later, the court mentions the presumption in the voice roaming order a second time, but in the context of addressing an arbitrary and capricious claim, not a common carrier claim. The court's summary of its finding that no common carriage exists makes no mention of the lack of a presumption as a factor in its decision.<sup>16</sup>

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<sup>12</sup> *Verizon*, 740 F.3d at 652.

<sup>13</sup> *Cellco Partnership*, 700 F.3d at 545.

<sup>14</sup> To be clear, the court cases do not require individualized negotiations. Rather, it seems that the courts have looked to see whether individualized negotiations are permitted as evidence in determining whether or not a non-discrimination obligation has been imposed.

<sup>15</sup> "True, providers must offer terms that are 'commercially reasonable.' But the data roaming rule, unlike the voice roaming rule, imposes no presumption of reasonableness. And the 'commercially reasonable' standard, at least as defined by the Commission, ensures providers more freedom from agency intervention than the 'just and reasonable' standard applicable to common carriers." Slip Op. at 24.

<sup>16</sup> "Given the room left for individualized negotiation, the clear differences between the public-access rules in *Midwest Video II* and this rule, and the deference owed the Commission, we conclude that the data roaming rule does not contravene the statutory exclusion of mobile-internet providers from common carrier status." *Id.*



Furthermore, even if the lack of a presumption in the data roaming rule were a material factor, it was probably the substance of the presumption, not the fact that a presumption was established, that might have influenced the court's decision. In the *Verizon* case, the court cited the presumption against paid prioritization because it was concerned that the Commission had imposed a non-discrimination obligation, not because of the use of a presumption in the abstract.

Thus, the Commission can use presumptions without triggering a finding of common carriage as long as it avoids imposing a non-discrimination duty to serve. The use of presumptions is important because presumptions can send signals to the market while also allowing sufficient flexibility for the Commission to make case-by-case determinations.

#### c. Paid Prioritization

Finally, some suggest that the *Verizon* case does not allow the FCC to prohibit edge provider paid prioritization under Section 706. The argument is that the courts would view edge provider paid prioritization as a requirement to carry traffic at a (regulated) price of zero, thereby triggering two of the three prongs of common carriage (a duty to serve and rate regulation). But prohibiting paid prioritization does not, in fact, impose a duty to provide service. Paid prioritization is a particular business practice that involves 1) payment, for 2) enhanced transmission of traffic. Banning paid prioritization is simply a prohibition against a very particular business practice, not a duty to serve every edge provider/consumer in exactly the same way.

#### d. Blocking

With regard to blocking, the Commission's proposal to require every ISP to offer a minimum level of service to every edge provider for free could be at risk of being overturned as a common carrier-like duty to serve. Instead, the Commission could require ISPs, as a condition of providing service, to carry out the will of the consumer to send and receive service from the web site or application provider of the consumer's choice. Framed in this manner, an anti-blocking measure is not a "duty to serve" because the ISP has already chosen to offer service; the "no-blocking" rule is simply a term and condition of that service. The Commission can and should use the same logic to bar "re-direction" – substituting a different web site or application for the web site or application chosen by the consumer. We thus suggest the following formulation of the no-blocking/no-redirection rule:

*A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block **an end user from accessing lawful content, applications, services, or non-harmful devices, or re-direct an end user to an application or service other than the application or service chosen by the consumer**, subject to reasonable network management.*

#### e. Hybrids

Several observers have proposed hybrid legal regimes that involve both Section 706 and Title II.

The *Verizon* decision opened the door to this train of thought by suggesting that the service provided by ISPs to edge providers could be regulated differently than the service provided by ISPs to consumers.<sup>17</sup> Both Mozilla<sup>18</sup> and Narechania/Wu<sup>19</sup> have proposed that the service provided to edge providers should be regulated under Title II, allowing the FCC to regulate ISPs' relationship with consumers under a different regulatory regime.

Without addressing the legalities of these proposals, it is difficult to understand how these hybrid regimes could be enforced in practice. Consumers and edge providers engage in continual interaction, and it is difficult to imagine how these interactive services (which are two sides of the same coin) could be regulated under two different regulatory regimes. This proceeding already involves significant complexities, and trying to discern which regulatory regime applies to which transaction would add to the complexity. Unlike circuit-switching, Internet transmissions are separated into packets that may take a variety of paths before they are re-assembled at the terminating point, and may include a series of back-and-forth queries and replies in a web of interfaces and devices. Furthermore, libraries and higher education and many others operate as both consumers and edge providers using the same Internet access services and facilities. The prospect that there could be two different regimes over different components of Internet access creates the potential for significant confusion and uncertainty, when one of the goals of this proceeding should be to send clear signals to the Internet marketplace.<sup>20</sup>

f. User-driven prioritization

AT&T has suggested that “user-driven” prioritization should be permitted, since the ISP would simply be prioritizing certain traffic at the request of the customer. There are mixed opinions about this proposal:

- On the one hand, allowing an ISP to manipulate traffic conflicts with the “entrance fee” model and the neutral role of the ISP. Allowing the ISP to step outside its role as a neutral provider of service opens the possibility that the ISP may engage in joint marketing arrangements with edge providers or engage in improper marketing practices to influence the consumer’s judgment. The

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<sup>17</sup> “[O]ne may be a common carrier with regard to some activities but not others.” *NARUC II*, 533 F.2d at 608. Because broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers’ ‘carriers,’ the obligations that the Commission imposes on broadband providers may well constitute common carriage *per se*. . .” *Verizon v. FCC*, Slip Op. p. 51.

<sup>18</sup> According to the Mozilla Petition, “Classification of remote delivery services as telecommunications services subject to Title II is a minimal, yet necessary, action to realize the statutory goals of the Communications Act in the modern era of network management and market operations. Such classification is definitively not ‘reclassification,’ as that term is commonly used, because it does not change the commercial relationships between ISPs and their subscribers, which can remain information services subject to Title I consistent with the arguments raised herein.”

<sup>19</sup> According to Narechania/Wu, “rather than treat *all* Internet traffic as a monolithic entity subject to the same regulatory treatment, the FCC can split the facilities-based services offered by broadband carriers into two discrete transactions: first, a *call* by a broadband subscriber to request data from a third-party content provider; and second, a content provider’s *response* to the subscriber. Imposing this two-stage call-and-response framework on the structure of Internet traffic—a framework derived from the D.C. Circuit’s recent decision in *Verizon*—would allow the Commission to separately consider the appropriate regulatory treatment for each type of transaction.” See, Tejas N. Narechania and Tim Wu, “Sender Side Transmission Rules for the Internet,” [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2447107](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447107).

<sup>20</sup> The hybrid proposal submitted by Rep. Waxman, in contrast, would not subject Internet transmissions to two different regulatory regimes. Rather the Waxman proposal asks the Commission to find that broadband Internet access is a common carrier service, but suggests that the FCC establish a regulatory regime largely under Section 706.

entire principle of an open Internet could become unwound if a broad form of user-directed prioritization is permitted.

- Furthermore, allowing ISPs to charge more for prioritized service, even if the consumer consents, gives the ISP incentives to build scarcity into its network, or at least reduces its incentives to build more capacity into the network. Consumer-driven prioritization could be a barrier to network deployment that conflicts with the Section 706 goal, which is to promote broadband deployment.
- On the other hand, certain customers, including libraries, may find it valuable to ask an ISP to prioritize certain traffic on their behalf under certain circumstances. AT&T has been offering such a service for several years, and allowing an ISP to engage in this business practice under certain conditions may be appropriate for certain customers.

This proposal may deserve further study and analysis under the “Internet reasonable” standard articulated above to see whether it would be consistent with the character and culture of the Internet and the “virtuous circle” of innovation.

## **VI. Conclusion**

Adopting an “Internet reasonable” standard is a strong, enforceable policy approach to protecting the openness of the Internet, regardless of whether the FCC adopts a legal approach under Title II, under Section 706, or some combination thereof. As ALA, ARL and others stated in our original comments in this proceeding, Title II and Section 706 each provide a viable legal path for protecting the openness of the Internet. Some of the legal issues discussed above assume that the Commission does not classify broadband Internet access as a Title II common carrier service, but the “Internet reasonable” approach could also work if the Commission does make such a Title II finding.

The “Internet reasonable” approach could and should include a mix of “bright line” rules and rebuttable presumptions, along with some flexibility to allow ISPs to engage in individualized negotiations over billing and caching. This approach would send important signals to the marketplace about acceptable and unacceptable behavior, while affording the Commission with flexibility to tailor its rules and enforcement decisions to the rapidly changing Internet market.

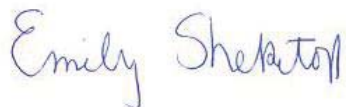
This standard focuses specifically on the purpose of this proceeding better than some other hypothetical and perhaps esoteric standard that cannot be explained, and better than borrowing a standard that was originally developed for a completely different objective. An “Internet reasonable” standard “hits the nail on the head.”

An Internet reasonable framework, as discussed above, would enable the Commission to provide a holistic, consistent approach to resolving open Internet complaints covering both the consumer side and the edge provider side in a manner that would protect the public interest in education, research and learning. If reclassification is not pursued by the FCC, it can still impose certain bright line rules, such as banning paid prioritization, and satisfy judicial review by 1) avoiding the use of the term “non-discrimination”, 2) by recognizing that ISPs do not have to treat every customer/edge provider in the

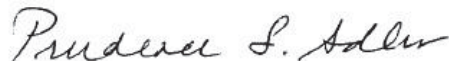
exact same way, and by 3) expressly identifying some aspects of Internet access service that can be negotiated. This regime would provide clear and strong protections to ensure the Internet remains open by flatly prohibiting the most damaging business practices, and by establishing presumptions against certain other practices.

Thank you for the opportunity to submit these views.

Sincerely,

A handwritten signature in blue ink that reads "Emily Sheketoff". The signature is written in a cursive, slightly slanted style.

Emily Sheketoff  
Executive Director, Washington Office  
American Library Association (ALA)

A handwritten signature in black ink that reads "Prue Adler". The signature is written in a cursive, slightly slanted style.

Prue Adler  
Executive Director  
Association of Research Libraries (ARL)